

MANISTEE CITY PLANNING COMMISSION

70 Maple Street, Manistee, Michigan 49660

Meeting of Thursday, August 5, 2004

7:00 p.m. - Manistee Middle School - Library, 550 Maple Street

AGENDA

- I Roll Call
- II Public Hearing
 - 1.
- III Approval of Minutes
 - Planning Commission Meeting (7/1/04)
- IV New Business
 - 1. Anderson/Smith - Parcel Split & Combination Request
- V Unfinished Business
 - None
- VI Other Communications
 - 1.
- VII Citizen Questions, Concerns and Consideration
(Public Comment Procedures on the Reverse Side)
- VIII Work/Study Session
 - 1. Zoning Ordinance Re-Write
 - 2.
- IX. Adjournment

Public Comment Procedures


The City of Manistee Planning Commission welcomes public comment in support of its decision-making process. To assure an orderly, fair and balanced process, the Planning Commission asks that participants at all public hearings and during the Public Comment portion of the meeting observe the following rule of procedure:

1. The Chairperson will recognize each speaker. When a speaker has the floor, he/she is not to be interrupted unless time has expired. Persons speaking without being recognized shall be out of order.
2. Each speaker shall state their name and address for the record and may present written comments for the record.
3. Speakers shall address all comments and questions to the Planning Commission.
4. Unless waived by the Planning Commission for a specific meeting or a specific speaker, public comment shall be limited to five (5) minutes per speaker, one time only. If a group of people wish to be heard on one subject, a spokesperson may be designated who may request that more than five (5) minutes be permitted for the collective comments of the group as presented by that speaker.
5. The Chairperson may request that repetitive comments be limited or abbreviated in the interest of saving time and allowing others to speak.
6. The Chairperson may establish additional rules of procedure for particular hearings as he/she determines appropriate.
7. Normal civil discourse and decorum is expected at all times. Applause, shouting, outbursts, demonstrations, name-calling or other provocative speech or behavior is not helpful to the decision-making process and may result in removal from the hearing or an adjournment.

Thank you for your interest in the work of the City of Manistee Planning Commission and for your cooperation with these rules of procedure.

MEMORANDUM

TO: Planning Commissioners

FROM: Denise Blakeslee 
Administrative Assistant - Community Development Department

DATE: July 30, 2004

RE: August 5, 2004 Planning Commission Meeting

We have received one item for the August 5, 2004 Planning Commission Meeting.

1. Andrew Anderson/Eugene Smith - Parcel Split and Combination Request. Andrew Anderson lives at 1401 Vine Street. Mr. Anderson wants to construct a detached garage on his property. This requires him to acquire the north 41 feet of property from Mr. Eugene Smith, 1405 Vine Street. Review of the project shows that the transfer of property will allow Mr. Anderson to construct the garage with both parcels still in compliance with the requirements of the Zoning Ordinance.

Jay Kilpatrick will not be in attendance for the meeting but we will continue discussion on the Zoning Ordinance Re-write during the worksession portion of the meeting.

We have scheduled the Citizen Information and Input Session for the Zoning Ordinance Re-write for Thursday, August 12th at 6:00 p.m. This session will be held in the Middle School Cafeteria. Members of the Planning Commission are encouraged to attend. A copy of the News release is attached.

If you have any questions or are unable to attend, please call me at 723-2558. See you Thursday!

:djb

Request to Split a Parcel

Name and Address of Applicant: ANDREW ANDERSON
1401 VINE STREET
MANISTEE, MI 49660

Signature Andrew Anderson

Phone Numbers: Home 723-5790 Work 845-0607 EXT 6522

Name and Address of other parties who have an interest: EUGENE SMITH
1405 VINE STREET
MANISTEE, MI 49660

Signature Eugene R Smith

Phone Numbers: Home 723-2003 Work

Parcel Identification Numbers for all parcels involved: 764 - 708-15, 764 - 708-12

Reason for request: NEED 41 FEET OF LOT 708-12 TO
BUILD A GARAGE.

Attach a sketch or site plan of all parcels involved in the request. The sketch must include the location of buildings and/or structures, building set-backs, streets, street names and lot dimensions.

Fee: \$50.00 for first split + \$25.00 for each additional split.

Receipt # 6502

WALL

VINE STREET

ROAD

1401 VINE ST.

House

32 X 32
GARAGE

4 1/2 FT.

BLOCK WALL

NEW PROPERTY LINE
INSIDE OF WALL

10 FT.
FROM INSIDE OF
WALL TO HOUSE
1405 VINE ST.

15 FT.

84 1/2 FT.

14 FT.

35 FT.

14 FT.

PROPERTY LINE

BLOCK WALL

BLOCK WALL

14 FT.
TO BE
OR
KILL

↑
Orth

Vine Street

51-51-764-

708-15

60'

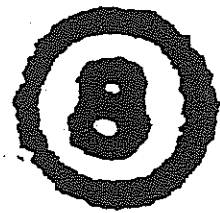
120'

51-51-764

703-12

← 4 FEET →

120'



120'

708-09

News Release

Manistee, Michigan. The City of Manistee has announced plans to hold a citizen information and input session concerning the effort to revise the City's Zoning Ordinance. The meeting will be held at the Manistee Middle School Cafeteria, 550 Maple Street, Manistee, Michigan - beginning at 6:00 p.m. on Thursday, August 12, 2004.

The purpose of the information and input session will be to allow residents and business owners an opportunity to meet with the City Planning Commission members, City Planning Staff and consultants and learn more about the on-going work to update and revise the Zoning Ordinance. In addition, the City will seek comments from attendees at the meeting to be sure that all input is received before the Zoning Ordinance is completed.

"We are very interested in creating a new Zoning Ordinance that is user-friendly and that responds well to emerging conditions in Manistee," said Roger Yoder, Chairman of the Planning Commission. He went on to explain that the citizen meeting is important because, "people that have experience with zoning and our ordinance may have suggestions that will help us achieve our objectives."

The meeting will include an overview of the Zoning Ordinance revision process to be presented by the City's planning consultants from Williams & Works. This will be followed by questions and comments from the audience. "We expect to have residents and business owners in attendance to give us a good basis to evaluate the ordinance from various perspective," explained Jon Rose, The City's Community Development Director.

The process to revise the Zoning Ordinance began last winter with the preparation by William's and Works of an overall evaluation of the document. Since then, the Planning Commission and Zoning Board of Appeals have been meeting with the consultants to provide their input. This citizen information and input session is intended to identify any additional issues before the new ordinance is prepared. After the public meeting. The Planning Commission and the planners from Williams & Works will work though the first draft of the new ordinance with a second public meeting to review the draft expected in five to six months.

For further information contact:

Jon Rose, Community Development Director
City of Manistee
P.O. Box 358
Manistee, MI 49660

jrose@ci.manistee.mi.us
www.ci.manistee.mi.us

231.723-2558

Commission seeks input on zoning

By **MELISSA J. RENNIE**
Associate Editor

MANISTEE — The Manistee City Planning Commission is hoping that the recent interest generated by a special use permit application for a coal-fired energy plant will translate into public interest in rewriting the city's zoning ordinance.

The commission has tentatively set the date of Aug. 12, at 7 p.m. at a location to be determined for the public to convey their concerns to the commission and Jay Kilpatrick, of Williams and Works, who is working as a consultant to help the commission rewrite the zoning ordinances.

Thursday night, Kilpatrick again met with the commission to discuss bringing the zoning ordinance, based on the 1988 master plan, into sync with the city's master plan that was adopted in 2002.

The zoning ordinance covers 20 districts — five residential, two industrial, four commercial and nine miscellaneous districts. Kilpatrick is hoping that the commission is able to combine some of the districts into more

COMMISSION/ continued from Page 1A

manageable sections.

One district that will no longer be covered under the zoning ordinances is the historical district, which is in the process of being pulled out and covered by the State Historical District Act.

Kilpatrick also presented the commission with the proposed framework and design of the new ordinances to see if they met with the commission's approval.

One topic of concern was lot coverage. Kilpatrick asked the commission, how much do you want to see covered? Kilpatrick said in the downtown district, most lots will have 100 percent of the lot covered by a structure.

Kilpatrick said it became much more difficult in residential districts, "you have to define what you mean covered — is it just the building, is it the building plus the accessory building(s), is it the building plus the accessory building(s) plus the driveway? All those types of

questions come up."

"If you can identify the kind of situations that you are trying to regulate," added Cyndy Fuller, "and you have examples in front of you, then I think it can help us try decide where we are at."

The next step is to sit down and write the ordinances. To do that, the commission is looking for public input, business owners, industrial leaders and anyone who is interested in having input in how the ordinances are written.

The commission is encouraging any one who has an interest in the future of Manistee to attend the meeting. If unable to attend, they can contact Community Development Director, Jon Rose, with concerns.

Kilpatrick described what he was looking for, "to kind of open up discussion from people who have some knowledge working with the city or working with the ordinance(s) or working with patterns of development to give

us their concerns, not necessary tell us what they want. What concerns you about land uses and planning in Manistee?"

Kilpatrick will use this input to draft ordinances for the commission and public to review and ultimately to be adopted by the city council.

In other business, Roger Yoder will be presenting the commission's annual report to the Manistee City Council during their meeting July 6.

See **COMMISSION** Page 6A

Commission still seeks public input

By **MELISSA J. RENNIE**
Associate Editor

MANISTEE — Planning Commission Chairperson Roger Yoder filled the Manistee City council in on the activities of the planning commission over the last year. The presentation was relatively short, because the council has been kept up to date on the very public activities of the planning commission.

"One item dominated the planning commission from October of 2003 to April 2004 and this item was the request for the special use permit from the Manistee Saltworks Development Corporation," said Yoder.

"This request resulted in a total of 18 meetings, special meetings and work sessions, lasting over 40 hours, including more than 16 hours of public comment. In addition, the planning commission reviewed 2,700 pages of documentation for this one request," added Yoder.

Yoder also summarized the other activities of the planning commission in the past year that included three zoning amendment requests, one special use permit request, one open air use request, two parcel split requests and one site plan review.

Yoder then went on to thank all volunteer members of the planning commission, Ray Fortier, who has been a member since 1997, Cyndy Fuller, who rejoined in 2003, Bob Davis, who has served since 2000, Greg Ferguson, who has served since 2001, Christy Johnson-Ross and Mark Wittlief, who both joined the planning commission in late 2003 and Tony Slavinski, who has 27 years of service on the planning commission.

Yoder also thanked four former members of

See **PLANNING** Page 6A

Article Published in Manistee News Advocate

PLANNING/continued from Page 1A

the planning commission who have moved on: Joyce Jeruzal, David Kelley, Phil Picardat, and John Serocki, who recently passed away.

"The planning commission has another huge undertaking on the agenda this next year," said Yoder.

"As with the rewrite and

completion of the master plan (for the city of Manistee) in December of 2002, we now must begin the rewriting of the zoning ordinance," explained Yoder. "The rewriting of the zoning ordinance was put on hold for almost six months due to the amount of time spent on the Manistee

Saltworks Development Corporation special use permit request."

"The new zoning ordinance will establish the zoning requirements for the city of Manistee following the vision of the master plan," said Yoder. "We want input from the public, business owners and property

owners, with this project. We encourage everyone to attend the meetings, work sessions and public hearings that will be held. We would like to see the public more involved."

The planning commission meets the first Thursday of every month.

Date Published: 7/12/04

Planning Commission asks for citizens' help

MANISTEE — The City of Manistee will hold a citizen information and input session to help revise the city's zoning ordinance. The meeting will be held Aug. 12 at 7 p.m. in the Manistee Middle School cafeteria.

"We are very interested in creating a new zoning ordinance that is user-friendly and that responds well to emerging conditions in Manistee," said Roger Yoder, chairperson of the planning commission. "People that have experience with zoning and our ordinance may have suggestions that will help us achieve our objectives," added Yoder.

The purpose of the information and input session will be to allow residents and business owners an opportunity to meet with the City Planning Commission, the City Planning Staff and consultants to learn more about the ongoing work to update and revise the

zoning ordinance. In addition, the city will seek comments from attendees at the meeting to be sure that all input is received before the Zoning Ordinance is completed.

The meeting will include an overview of the Zoning Ordinance revision process to be presented by the city's planning consultants from Williams and Works. The presentation will be followed by questions and comments from the audience.

"We expect to have residents and business owners in attendance to give us a good basis to evaluate the ordinance from various perspectives," explained Jon Rose, Community Development Director.

The commission began the process of revising the zoning ordinance last winter, with an overall evaluation of the doc-

See CITIZEN Page 7A

CITIZEN/ continued from Page 1A

ment by Williams and Works. After reviewing the document, the planning commission and Zoning Board of Appeals have been meeting with the consultants to provide their input.

The commission wants citizen input to identify any additional issues before the new ordinance is prepared.

After the public meeting, the planning commission and the consultants from Williams and Works will work through the first draft of the new ordinance. When it is complete, a second public meeting to review the draft will be held. The draft is expected to take five to six months to write.

**NOTE: TIME IS WRONG IN ARTICLE
MEETING WILL BEGIN AT 6:00 p.m.**

Manistee City Planning Commission Annual Report

July 6, 2004

Good Evening!

As Chairman of the City of Manistee Planning Commission it is my pleasure to give an update on their activities since July 2003. One item dominated the Planning Commission from October 2003 thru April of 2004. This item was the request for a Special Use Permit from Manistee Saltworks Development Corporation. This request resulted in a total of 18 meetings, special meetings or worksessions lasting over 40 hours including more than 16 hours of public comments. In addition the Planning Commissioners reviewed over 2,700 pages of documentation for this one request.

Besides the request from Manistee Saltworks Development Corporation the Planning Commission deliberated on:

- | | | |
|---|---|-----------------------------------|
| 3 | - | Zoning Amendment Requests |
| 1 | - | Special Use Permit Request |
| 1 | - | Open Air Use Request |
| 2 | - | Parcel Split/Combination Requests |
| 1 | - | Site Plan Review |

I would like to take a moment to recognize the volunteers who have served on the Planning Commission since our last report.

Current members are:

- | | | |
|----------------------|---|---|
| Ray Fortier | - | Ray has been on the Planning Commission since November 1997 and serves as our Vice-Chair. |
| Cyndy Fuller | - | Cyndy previously served on the Planning Commission and re-joined the Commission in November of 2003, Cyndy serves as our Secretary. |
| Bob Davis | - | Bob has served on the Planning Commission since September 2000 |
| Greg Ferguson | - | Greg has been a member of the Planning Commission since January 2001 |
| Christa Johnson-Ross | - | Christa is our newest member and has been with us since December 2003 |
| Tony Slawinski | - | Tony is our longest serving member with almost 27 years of service to the Planning Commission. |

- Mark Wittlief - Mark moved from the Zoning Board of Appeals to the Planning Commission in November 2003.
- Roger Yoder - I am the Chairman of the Planning Commission and have served since 1984

We have four members who have left the Planning Commission and I would like to acknowledge them for their service.

- Joyce Jeruzal - Joyce was Secretary of the Planning Commission and resigned when her family moved out of the area.
- David Kelley - David resigned in June due to a personal obligation.
- Phil Picardat - Phil resigned because he took a job out of town
- John Serocki - John was a dedicated member of the Planning Commission who resigned because of health reasons and passed away in 2004.

We currently have one vacancy on the Commission.

The Planning Commission has another huge undertaking on their agenda this next year. With the completion of the Master Plan in December 2002 we now must begin Re-writing the Zoning Ordinance. The re-writing of the Zoning Ordinance was put on hold for almost six months due to the amount of time spent on the Manistee Saltworks Development Corporation Special Use Permit request. Jay Kilpatrick from Williams and Works has been selected as our consultant to assist with this process. The new Zoning Ordinance will establish the Zoning requirements for the City of Manistee following the vision of the Master Plan. We want input from the public, business owners and property owners with this process. We encourage everyone to attend the meetings, worksessions and public hearings that will be held.

In closing I would like to thank the Planning Commissioners for their service to the Community this past year. The Planning Commission does not receive compensation for their dedicated service to the City of Manistee. Also Jon Rose and Denise Blakeslee who act as Staff Liaison and Support Staff to the Planning Commission.

Thank you.

The Manistee Salt Works Development Corporation

PRESS RELEASE

**MANISTEE SALT WORKS FILES COMPLAINT IN FEDERAL
COURT AGAINST THE CITY OF MANISTEE
FOR VIOLATION OF CONSTITUTIONAL RIGHTS**

FOR IMMEDIATE RELEASE

Manistee, MICH., July 14, 2004 -- The Manistee Salt Works Development Corporation, developer of the proposed Northern Lights power plant, yesterday filed suit in the U.S. District Court for the Western District of Michigan against the City of Manistee, Michigan. Manistee Salt Works alleges its constitutional rights and Michigan and federal laws were violated by the City of Manistee in connection with the City's handling of an application for a land use permit.

In its lawsuit, Manistee Salt Works alleges that the Manistee Planning Commission applied illegal criteria in deciding to deny Manistee Salt Works the special use permit needed to build a planned \$700 million power plant in the City of Manistee. The suit claims more than \$100 million in damages from the City.

"This is about the rights of individuals. Neither a small group of people nor a municipality should be permitted to keep a landowner from the lawful use of his property," said Beverly Baker, Manistee Salt Works' Vice President. "The constitution and laws set strict limits on how the use of land may be restricted by the people running local governments. We believe the Planning Commission acted outside those limits and made its decision in an unfair, illegal, and arbitrary way."

The Northern Lights power plant was proposed to meet Michigan's growing demand for power and to supply reliable, affordable and clean electricity to consumers in Michigan. The power plant would have been located on an existing industrial site containing an abandoned salt manufacturing plant, an existing coal-fueled power plant, and a coal and aggregate storage dock. The Northern Lights Project would have resulted in cleaning up an environmentally contaminated site on the Manistee Lake shoreline, created hundreds of union construction jobs with an estimated payroll of \$130 million, and created more than 50 new permanent jobs in the Manistee area. The annual operating budget for the Northern Lights power plant was projected to spend more than \$60 million, of which \$20 million would have been spent for wages, services and supplies within the local and state economies.

Please direct inquiries to:

Rodger Kershner, Esq.
Howard & Howard Attorneys, P.C.
Attorneys for Manistee Salt Works
Bloomfield Hills, MI (248) 723-0421

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

THE MANISTEE SALT WORKS DEVELOPMENT
CORPORATION, a Michigan corporation,

Plaintiff,

v.

CITY OF MANISTEE, a Michigan municipal
corporation,

Defendant.

Case No. 04-

4-04CV95

Hon.

Judge
Richard E. Enstien

HOWARD & HOWARD ATTORNEYS, P.C.

Roger L. Myers (P49186)

Rodger A. Kershner (P26049)

Christopher E. Tracy (P46738)

Attorneys for Plaintiff

101 N. Main Street, Suite 430

Ann Arbor, MI 48104

(734) 222-1483

COMPLAINT

There is no other civil action between these parties arising out of the same transaction or occurrence as alleged in this complaint pending in this court, nor has any such action been previously filed and dismissed or transferred after having been assigned to a judge, nor do I know of any other civil action, not between these parties, arising out of the same transaction or occurrence as alleged in this complaint that is either pending or was previously filed and dismissed, transferred, or otherwise disposed of after having been assigned to a judge in this court.

Plaintiff, THE MANISTEE SALT WORKS DEVELOPMENT CORPORATION ("MSWDC" or "Plaintiff"), by and through its attorneys, HOWARD & HOWARD ATTORNEYS, P.C., states for its Complaint against Defendant, CITY OF MANISTEE ("the City" or "Defendant"), as follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff is a Michigan corporation that conducts business in the County of Manistee, State of Michigan.

2. Defendant is a municipal corporation organized under the laws of the State of Michigan and is located in the County of Manistee, State of Michigan.

3. Plaintiff seeks monetary damages and injunctive relief in this action as a result of the deprivation of its rights under the Constitution and laws of the United States, for which this Court possesses original federal jurisdiction pursuant to 28 U.S.C. § 1331. Plaintiff also seeks declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202.

4. The real property that is the subject of this action is located, and the events giving rise to the claims set forth herein occurred, in the County of Manistee, State of Michigan, for which venue is proper pursuant to 28 U.S.C. § 1391(b).

COMMON ALLEGATIONS

5. Plaintiff incorporates and realleges the preceding paragraphs as if fully restated herein.

6. MSWDC possesses an ownership interest in a parcel of property consisting of approximately thirty (30) acres (the "Property"), which is located along the Manistee Lake shoreline in the City. The Property contains an abandoned salt manufacturing plant, an existing coal-fueled power plant, and a coal and aggregate storage dock. Historically, over the past several decades, the Property has included the use of coal-fueled boilers with outside coal storage, and the Property qualifies as a Brownfield Redevelopment site by the State of Michigan. The buildings currently on the Property exceed one hundred (100) feet in height, and the Property is buffered by a Transition Zoning District.

7. In late-2002, representatives of MSWDC approached entities representing eighteen Michigan municipalities to inquire of their interests in purchasing power from a new coal-fueled power plant to be located in the Manistee area. The Property was ultimately selected as the location for the project because it represents a rare remaining site in Michigan that can accommodate a new coal-fueled power plant, given its access to existing infrastructure, Great Lakes shipping, and 345kV transmission lines, and its favorable location for necessary permitting from the federal and state governmental agencies.

8. In January, 2003, Plaintiff's representatives entered into a Cooperation Agreement with the consortium of entities representing the Michigan municipalities for the joint pursuit of a coal-fueled power plant to be developed and operated on the Property to be known as the Northern Lights Project (the "Project"). During the summer and fall of 2003, Plaintiff's representatives engaged in several meetings with the mayor, City manager, several council members, and City community development director, who collectively and emphatically encouraged Plaintiff to pursue the Project.

9. The Property is zoned by the City as part of the I-2 Lakefront Industrial District. According to section 6701 of the City's zoning ordinance, the purpose of this district includes "prioritizing the use of certain lakefront property on Manistee Lake for industrial businesses which require the use of the lake and require being in the proximity of the lake." Another purpose of the district as described by the ordinance is "to provide for heavy industry in an area which is removed from residential and commercial activity." Thus, the Project represents a use that is contemplated by the I-2 district and consistent with the objectives sought to be achieved therein.

10. The use of the Property as a coal-fueled power plant is permitted by right in the I-2 district under section 6702 of the City's zoning ordinance if (1) all activity is carried on entirely within an enclosed building, (2) all accessory/work areas are enclosed by a solid wall, (3) there is no alteration to the lake shore, and (4) access to lake water for economic advantages is an integral part of the site selection. If the proposed use includes (1) activity outside an enclosed building, (2) activity not in a work area enclosed by a solid wall, (3) discharge of water, treated or untreated, to Manistee Lake, and (4) alteration to the Manistee Lake shoreline, a special use permit must be secured from the City in accordance with the standards set forth in section 8609 of the City's zoning ordinance.

11. Because the proposed power plant includes the outside storage of coal (consistent with the historical use of the Property), the discharge of treated water to Manistee Lake, and the alteration of the lake shoreline to accommodate the docking of coal freighters (collectively the "Three Special Use Criteria"), Plaintiff submitted an application for a special use permit from the City for the Project on September 24, 2003.

12. Plaintiff's representatives thereafter submitted voluminous information requested by the City, including a site plan for the Project, and engaged in numerous meetings with City officials and work sessions with the City's Planning Commission.

13. In connection with Plaintiff's application, the City engaged the planning consulting firm Williams and Works ("W&W") to review the information submitted for the Project to determine compliance with the six factors that must be considered for special use permits in section 8609 of the City's zoning ordinance. On November 13, 2003, W&W issued a report recommending that the Planning Commission approve the special use permit for the Project, subject to certain conditions of oversight by the City regarding the permits

to be secured from federal and state government agencies and approval of the final site plan upon the issuance of such permits. In support of its recommendation, W&W specifically recognized "the substantial economic benefit and added tax base the project represents to the community." W&W also observed that the site plan submitted by Plaintiff "is as complete as possible," and recommended conditional approval of the site plan subject to (1) additional modifications resulting from the federal and state permits and (2) the limitation of the height of outdoor coal storage piles to fifty (50) feet or less, which were acceptable to Plaintiff.

14. On or about February 5, 2004, the City's Planning Commission determined that MSWDC had submitted all necessary information required by the zoning ordinance in sufficiently complete detail for consideration of the special use permit application.

15. The Planning Commission thereafter held several public hearings. At the hearings, there existed significant public opposition to the Project based on perceived impacts to tourism in the area and water and air quality issues. However, the potential impact to water or air quality is regulated through permits issued by the federal Environmental Protection Agency ("EPA") and the Michigan Department of Environmental Quality ("MDEQ"), and W&W confirmed in its November 13, 2003 report that the City "has not established any objective standards to measure or monitor off-site air or water quality impacts."

16. On or about March 10, 2004, W&W issued another report analyzing Plaintiff's application. In this report, W&W reiterated that the Project will actually help improve and stabilize the Manistee Lake shoreline. After again analyzing the six factors set forth in section 8609 of the City's zoning ordinance as they relate to the Three Special Use Criteria, W&W

recommended that the Planning Commission consider imposing the following conditions to any special use permit issued to Plaintiff:

- a. Submission of final engineered site plan appropriately addressing elements such as, but not limited to, site lighting, landscaping (including maintenance), on-site circulation, appropriate fire separation distances, and other site-related issues.
- b. Approved NPDES permit for discharge of process water and disclosure of discharge limits, unless the City determines that discharge of process water to the municipal wastewater system is in the best interest of the community.
- c. Fuel source limited to low-sulfur coal only from the Power River basin or another source of low sulfur coal.
- d. Per applicant's assertion, mercury removal systems to incorporate maximum achievable control technology.
- e. Approved MDEQ and EPA air emission permit and disclosure of emission limits.
- f. Copy of an approved Army Corps of Engineers permit and MDEQ permit for shoreline improvements and disclosure of the permits particulars.
- g. Submission of a MDEQ-approved site remediation plan including all site clean-up standards as established by the City and MDEQ.
- h. Executed agreement or other documentation committing to pay a community service fee in an amount acceptable to the City, the terms of which shall include agreement to provide the City with copies of the annual audited financial statements.
- i. Agreement to provide the City with copies of periodic air and water quality monitoring reports that may be required under any permits issued.
- j. Install groundwater monitoring wells to acquire baseline contaminate information and provide quarterly monitoring of groundwater quality to the City.

- k. Noise levels to be maintained below 65 decibels at the property line and applicant to provide the City with a sound meter for monitoring purposes.
- l. Establishment of a Performance Bond to the benefit of the City to assure either satisfactory completion of the facility in accord with the requirements of all permits, the special land use permit and the site plan, or in the event the construction is abandoned prior to completion, removal of existing and any new structures or parts of structures and complete reclamation of the site in accord with an approved remediation plan.
- m. Establishment of an escrow bond or other surety satisfactory to the City to support the ultimate decommissioning of the facility and the reclamation of the site in accord with the then existing City of Manistee Master Plan.
- n. All coal conveyors to include dust mitigation and fire suppression systems, including the self-unloading equipment on the freighters.
- o. Final approval of the fire suppression system by the City Fire Chief and fulfilling of the training and equipment requirements associated with the establishment of the plan, as outlined by the City Fire Chief.
- p. All coal freighters shall be prohibited from discharging ballast water in the Manistee River Channel or in Manistee Lake.
- q. The applicant shall agree to pay all bridge opening fees necessitated by its operation.

17. On March 31, 2004, Plaintiff sent a letter to the City objecting to the imposition of any conditions suggested by W&W that were unrelated to the Three Special Use Criteria on the grounds that such regulation exceeds the scope of the City's authority under the City And Village Zoning Act, MCL § 125.581, et seq. and/or is preempted by federal or state law. With respect to the proposed conditions that related to the Three Special Use Criteria, MSWDC stated that it had no objection thereto or requested clarification from the City regarding the specifics of the proposed condition.

18. At a public hearing on April 1, 2004, the City's community development director, Jon R. Rose, recommended that the Planning Commission deny the special use permit sought by Plaintiff. After characterizing the proposed power plant (which is permitted by right under the City's zoning ordinance but for the Three Special Use Criteria) as a "dubious project," Mr. Rose explained that the planning department's opposition was based upon Plaintiff's refusal to capitulate to the conditions that were beyond the scope of the City's regulatory authority as outlined in Plaintiff's March 31, 2004 letter.

19. This retaliatory opposition to the special use permit as a result of Plaintiff's refusal to capitulate to the ultra vires demands by the City's planning department is an unlawful, discriminatory interference with Plaintiff's right to a consideration of the permit application under the standards set forth in the City And Village Zoning Act, MCL 125.581, et seq. and the City's zoning ordinance. Nonetheless, at the conclusion of Mr. Rose's comments during the April 1, 2004 meeting, the Planning Commission followed his recommendation and voted to draft a resolution to deny the special use permit sought by Plaintiff.

20. On or about April 15, 2004, the Planning Commission adopted a resolution denying the special use permit.

21. In an attempt to justify its unlawful action in the resolution, many of the alleged grounds on which the Planning Commission based its denial were inconsistent with the findings of W&W, whom the City had retained to analyze Plaintiff's application. For example, W&W determined that the proposed Project complied with all applicable regulations of the City's zoning ordinance, including the height of the proposed structures because the City's zoning ordinance "permit[s] structures of any height in the I-2 District if approved by

the Planning Commission in connection with a special land use permit.” Contrary to the finding of its professional planning consultant, the Planning Commission based its denial, in part, on the allegation that the height of the proposed structures impermissibly exceeds the height limitations “found in Section 1042 of the Zoning Ordinance.” As another example, the Planning Commission defined adjacent land uses to “include nearby properties that do not physically abut the site” and determined that the height of the proposed structures were incompatible with such “adjacent land uses.” Yet, W&W acknowledged in its report that because “adjacent land uses are contiguous, sharing a common boundary . . . the Zoning Ordinance seems to require that the Planning Commission only consider compatibility with uses that share a boundary with the site.” In yet another example, although W&W determined that “based on the information provided and the review of the City Engineer impacts on roads and public utilities appear to be within the capacity of existing infrastructure,” the Planning Commission claimed in the resolution that “the wear and tear on local roads and bridges will exacerbate the deterioration of such facilities and the economic contribution the proposed Project would make to the good of the community is undetermined.” In perhaps the most striking contradiction, the Planning Commission found the proposed use is not reasonable despite the observation by W&W in its November 13, 2003 report that “the use itself is reasonable, essentially by definition.”

22. The resolution denying Plaintiff’s special use permit was also premised upon findings that were inconsistent with previous determinations by the Planning Commission itself. Although the Planning Commission determined on February 5, 2004 that Plaintiff had submitted all necessary information under the City’s zoning ordinance in sufficiently complete detail to support its special use permit application, the Planning Commission attempted to

justify its denial by claiming that the site plan submitted by Plaintiff “fails to fulfill the standards of Article 94 of the Zoning Ordinance.” The resolution also acknowledges that the decision by the Planning Commission was based, in part, on the significant political opposition to the Project from the public, which is a legally impermissible factor on which to base the denial of a special use permit.

23. The City Council possesses the authority under the City’s zoning ordinance to overturn the findings and decision of the Planning Commission regarding special use permits. However, on April 20, 2004, the City Council voted to approve the decision of the Planning Commission.

24. The City’s denial of the special use permit sought by Plaintiff is based upon a discriminatory, unreasonable, arbitrary and capricious enforcement of its zoning ordinance, is not reasonably related to public health, safety and general welfare, and exceeds the scope of the City’s authority under the City And Village Zoning Act, MCL § 125.581, et seq. The inability to develop and operate the proposed power plant on the Property as a result of Defendant’s violations of Plaintiff’s constitutional and statutory rights results in losses to MSWDC that exceed \$100,000,000.00, several million dollars of which have already been incurred.

25. Despite its violations of Plaintiff’s constitutional rights in connection with the denial of the special use permit, the City now contends that Plaintiff is obligated to reimburse the City for all consulting fees and costs incurred in processing Plaintiff’s special use permit application in the amount of \$111,518.55.

26. The City lacks the legal authority to obligate payment of such fees and costs from Plaintiff, which in any event are excessive and unreasonable. In addition, many of these fees and costs do not in any manner relate to the Three Special Use Criteria.

27. There exists an actual case or controversy regarding the extent of Plaintiff's obligation, if any, to reimburse the City for all such consulting fees and costs, for which Plaintiff seeks a declaratory judgment that the City lacks the legal authority to impose such obligation on Plaintiff.

COUNT I
VIOLATION OF EQUAL PROTECTION RIGHTS

28. Plaintiff incorporates and realleges the preceding paragraphs as if fully restated herein.

29. Defendant's actions as set forth above deprive Plaintiff of its right to make lawful, reasonable use of the Property, its right to engage in a lawful business, and its right to be free from unlawful interference in the development and use of the proposed power plant.

30. The actions by Defendant in the selective and discriminatory enforcement of its zoning ordinance were done maliciously and with reckless indifference to the rights of Plaintiff, which deprives Plaintiff of its constitutionally-protected right to equal protection under the Fourteenth Amendment to the United States Constitution.

31. Defendant's deliberate denial, under color of law, of Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment constitutes a violation of 42 U.S.C. § 1983.

32. As a direct and proximate result of Defendant's violation of Plaintiff's constitutionally-protected right to equal protection, Plaintiff has incurred and continues to

incur substantial monetary damages and irreparable harm.

WHEREFORE, Plaintiff The Manistee Salt Works Development Corporation respectfully prays that this Honorable Court enter a Judgment in its favor and against Defendant City of Manistee, which awards Plaintiff the following relief:

A. Declaring the City's actions invalid and unconstitutional both facially and as applied to Plaintiff's Property;

B. Declaring that the proposed development and use of the Property for the coal-fueled power plant proposed by Plaintiff constitutes a reasonable use of the Property;

C. Enjoining the City and its officers and agents from interfering with the development and use of the Property for the proposed coal-fueled power plant;

D. Ordering the City, its officers and agents to process such applications and subsequently issue such permits and approvals as are necessary to permit development and use of the proposed coal-fueled power plant;

E. Awarding Plaintiff compensatory and exemplary damages, plus attorneys' fees, costs and interest pursuant to 42 U.S.C. § 1983; and

F. Awarding Plaintiff all other relief that is just and equitable.

COUNT II
VIOLATION OF SUBSTANTIVE DUE PROCESS RIGHTS

33. Plaintiff incorporates and realleges the preceding paragraphs as if fully restated herein.

34. Defendant's actions as set forth above deprive Plaintiff of its right to make lawful, reasonable use of the Property, its right to engage in a lawful business, and its right

to be free from unlawful interference in the development and use of the proposed power plant.

35. The actions by Defendant are wholly arbitrary, capricious and unreasonable, fail to promote the public health, safety and general welfare, and were done maliciously and with reckless indifference to the rights of Plaintiff, which deprive Plaintiff of its constitutionally-protected right to substantive due process under the Fourteenth Amendment to the United States Constitution.

36. Defendant's deliberate denial, under color of law, of Plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment constitutes a violation of 42 U.S.C. § 1983.

37. As a direct and proximate result of Defendant's violation of Plaintiff's constitutionally-protected right to substantive due process, Plaintiff has incurred and continues to incur substantial monetary damages and irreparable harm.

WHEREFORE, Plaintiff The Manistee Salt Works Development Corporation respectfully prays that this Honorable Court enter a Judgment in its favor and against Defendant City of Manistee, which awards Plaintiff the following relief:

A. Declaring the City's actions invalid and unconstitutional both facially and as applied to Plaintiff's Property;

B. Declaring that the proposed development and use of the Property for the coal-fueled power plant proposed by Plaintiff constitutes a reasonable use of the Property;

C. Enjoining the City and its officers and agents from interfering with the development and use of the Property for the proposed coal-fueled power plant;

D. Ordering the City, its officers and agents to process such applications and subsequently issue such permits and approvals as are necessary to permit development and use of the proposed coal-fueled power plant;

E. Awarding Plaintiff compensatory and exemplary damages, plus attorneys' fees, costs and interest pursuant to 42 U.S.C. § 1983; and

F. Awarding Plaintiff all other relief that is just and equitable.

COUNT III
DECLARATORY JUDGMENT
VIOLATION OF CITY AND VILLAGE ZONING ACT

38. Plaintiff incorporates and realleges the preceding paragraphs as if fully restated herein.

39. Section 4a of the City And Village Zoning Act, MCL §125.584a, provides the statutory basis upon which the City may regulate certain land uses and activities through a special land use approval process.

40. Section 4a of the City And Village Zoning Act mandates that the City's zoning ordinance specify the activities eligible for special use approval consideration and the requirements and standards upon which decisions on requests for special land use approval shall be based.

41. As set forth above, Defendant denied the special use permit based upon factors that were unrelated to the Three Special Use Criteria and based upon the application of standards that are contrary to the standards set forth in the City's zoning ordinance.

42. There exists an actual case or controversy regarding the validity of the City's action under section 4a of the City And Village Zoning Act, for which Plaintiff is entitled to

an expedited hearing and a declaratory judgment that the City's denial of the special use permit constitutes a violation of MCL § 125.584a.

WHEREFORE, Plaintiff The Manistee Salt Works Development Corporation respectfully prays that this Honorable Court enter a Judgment in its favor and against Defendant City of Manistee, which awards Plaintiff the following relief:

A. Declaring the City's actions invalid as a violation of section 4a of the City and Village Zoning Act, MCL § 125.584a;

B. Declaring that the proposed development and use of the Property for the coal-fueled power plant proposed by Plaintiff constitutes a reasonable use of the Property;

C. Enjoining the City and its officers and agents from interfering with the development and use of the Property for the proposed coal-fueled power plant;

D. Ordering the City, its officers and agents to process such applications and subsequently issue such permits and approvals as are necessary to permit development and use of the proposed coal-fueled power plant; and

E. Awarding Plaintiff all other relief that is just and equitable.

COUNT IV
DECLARATORY JUDGMENT
PAYMENT OF CITY CONSULTING FEES AND COSTS

43. Plaintiff incorporates and realleges the preceding paragraphs as if fully restated herein.

44. As set forth above, the City now contends that Plaintiff is obligated to reimburse the City for all consulting fees and costs incurred in processing Plaintiff's special use permit application in the amount of \$111,518.55.

45. The City lacks the authority under the City And Village Zoning Act to obligate payment of such fees and costs from Plaintiff, which in any event are excessive and unreasonable

46. There exists an actual case or controversy regarding the extent of Plaintiff's obligation, if any, to reimburse the City for all such consulting fees and costs, for which Plaintiff is entitled to an expedited hearing and a declaratory judgment that the City lacks the legal authority to impose such obligation.

WHEREFORE, Plaintiff The Manistee Salt Works Development Corporation respectfully prays that this Honorable Court enter a Judgment in its favor and against Defendant City of Manistee, which awards Plaintiff the following relief:

A. Declaring the City's attempt to obligate payment from Plaintiff of the City's consultant fees and costs as exceeding the scope of the City's authority under the City and Village Zoning Act, MCL § 125.581, et seq.;

B. Declaring that the proposed development and use of the Property for the coal-fueled power plant proposed by Plaintiff constitutes a reasonable use of the Property;

C. Enjoining the City and its officers and agents from interfering with the development and use of the Property for the proposed coal-fueled power plant;

D. Ordering the City, its officers and agents to process such applications and subsequently issue such permits and approvals as are necessary to permit development and use of the proposed coal-fueled power plant; and

E. Awarding Plaintiff all other relief that is just and equitable.

JURY DEMAND

Plaintiff hereby demands a trial by jury of all issues in this action.

Respectfully submitted,

HOWARD & HOWARD ATTORNEYS, P.C.

By: _____
Roger L. Myers (P49186)
Rodger A. Kershner (P26049)
Christopher E. Tracy (P46738)
Attorneys for Plaintiff
101 N. Main Street, Suite 430
Ann Arbor, MI 48104
(734) 222-1097

Dated: July 13 2004